Supreme Court, U.S.
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No. 93-1489

In the Supreme Court of the United States

OCTOBER TERM, 1993

CAROL LOWERY, ETC., ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Tax Injunction Act, 28 U.S.C. 1341, bars a federal district court from granting injunctive and declaratory relief to the Federal Deposit Insurance Corporation (FDIC) against activities of local taxing authorities that are preempted by 12 U.S.C. 1825(b) (Supp. IV 1992).

2. Whether 12 U.S.C. 1825(b)(2) (Supp. IV 1992) prohibits local taxing authorities from conducting an involuntary foreclosure sale to collect ad valorem taxes from real property owned by the FDIC.

3. Whether 12 U.S.C. 1825(b)(1) (Supp. IV 1992) grants the FDIC the right to challenge property valuations that are used to assess ad valorem taxes against property owned by the FDIC if the valuations are made before the FDIC acquires the property in question.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 12 F.3d 995. The opinion of the district court (Pet. App. 9a-19a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1993. The petition for a writ of certiorari was filed on March 22, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1987, the Comptroller of the Currency declared Security National Bank & Trust Company to be insolvent and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver. In connection with a sale by the receiver of the operating assets of Security to a third party, the FDIC in its corporate capacity acquired a promissory note executed by William J. O'Connell and Doris J. O'Connell. Because the O'Connells were unable to repay the indebtedness described in the note, in January of 1990 they conveyed to the FDIC a parcel of land located in Cleveland County, Oklahoma. In March of 1991, petitioner Lowery notified the FDIC that she planned to sell the parcel at a foreclosure sale to satisfy unpaid ad valorem taxes for 1987 through 1990. See Pet. App. 3a, 10a-11a.

2. The FDIC then commenced this action in the United States District Court for the Western District of Oklahoma, seeking injunctive and declaratory relief to prevent the sale. The district court issued an opinion resolving the principal legal questions presented by cross-motions for summary judgment. Pet. App. 9a-19a. First, the district court concluded that 12 U.S.C. 1825(b)(2) (Supp. IV 1992) does not permit petitioners to conduct an involuntary sale of property owned by the FDIC to satisfy ad valorem taxes. Pet. App. 13a-15a. Second, the court concluded that the same provision prevents liens to secure payment of taxes from attaching to property while the FDIC owns it. *Id.* at 15a-17a. Third, the court concluded that the FDIC is entitled to obtain a redetermination of the valuation on which the taxation was based, except with respect to the valuations for years before the FDIC acquired the property. *Id.* at 17a-19a. Finally, the court concluded that 12 U.S.C.

1825(b)(3) (Supp. IV 1992) prohibits petitioners from assessing fines or penalties based on the failure of the FDIC or the prior owners to pay the taxes in a timely manner. Pet. App. 19a.

The district court granted motions by both petitioners and the FDIC authorizing an interlocutory appeal under 28 U.S.C. 1292(b). Docket Entries 36 (Aug. 28, 1992), 37 (Sept. 4, 1992). On September 28, 1992, the court of appeals granted permission to the parties to pursue the interlocutory appeals. C.A. App. 148-149.

3. The court of appeals rejected petitioners' appeal, but reversed the portion of the district court's ruling challenged by the FDIC. Pet. App. 1a-8a. First, the court of appeals agreed (*id.* at 4a-5a) that 12 U.S.C. 1825(b)(2) (Supp. IV 1992) prohibits any sale of the FDIC's property without its consent, explaining that "[t]he text of [S]ection 1825(b)(2) is unequivocal and suggests no implied exception." Pet. App. 5a. The court also agreed with the district court's holding that Section 1825(b)(2) "shields the FDIC from involuntary liens," stating that the statute "explicitly" requires that result. Pet. App. 6a. Finally, the court concluded that Section 1825(b)(1) allows the FDIC to challenge ad valorem tax assessments. Pet. App. 6a-8a. The court rejected the district court's conclusion that there is an implied exception that bars challenges to assessments made before the FDIC acquired the property, stating that "we perceive nothing in the plain language of the statute temporally limiting the right of the FDIC to seek and obtain revaluation." *Id.* at 7a-8a.

ARGUMENT

1. Petitioners first argue (Pet. 7-11) that the relief issued by the district court violates the Tax Injunction Act, 28 U.S.C. 1341. That question is not properly before

this Court. It was not included in the questions presented to the court of appeals for interlocutory review.[1] The court of appeals thus had no occasion to consider it. The question is jurisdictional, and accordingly the district court remains free to consider it on remand. There is no reason for this Court to depart from its settled practice of declining to review questions not decided by the courts below. *E.g., Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984).

2. Petitioners also ask the Court to resolve two questions of "first impression" (Pet. 11) regarding the application of 12 U.S.C. 1825(b) (Supp. IV 1992) to state ad valorem taxes. Pet. 11-16. In neither case do petitioners offer a substantial basis for doubting the correctness of the court of appeals' application of the statute.

a. First, petitioners argue (Pet. 12-14) that the lower courts erred in concluding that petitioners cannot sell the FDIC's property without its consent as a means of collecting ad valorem taxes assessed against that property. As the court of appeals recognized, the main obstacle to that argument is the statutory language, which provides: "No property of the [FDIC] shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the [FDIC], nor shall any involuntary lien attach to the property of the [FDIC]." 12 U.S.C. 1825(b)(2) (Supp. IV 1992). The language refers expressly to "foreclosure" and uses mandatory terms to

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[1] The Petition for Permission To Appeal Pursuant To 28 U.S.C. § 1292(b) that petitioners filed in the court of appeals seeks review only of the questions decided by the district court. See *id.* at 8-9. By orders dated November 5, 1993, and November 10, 1993, the court of appeals denied motions of the parties to file supplemental briefs addressing the Tax Injunction Act.

prohibit any exercise of the listed remedies "without the consent of the [FDIC]." *Ibid.*

Petitioners offer no interpretation of the language that would permit the foreclosure at issue in this case, but simply state that application of the plain language of the statute would make it unacceptably difficult for local taxing authorities to collect ad valorem taxes from property owned by the FDIC. Arguments about the difficulties imposed by the statute, however, are properly addressed to Congress, not the federal courts. In addition, petitioners exaggerate the burdens imposed by the statute. First, the statute only bars exercise of the listed remedies while the FDIC owns the property; after the FDIC sells the property, petitioners would be free to exercise any rights accruing under state law with respect to which liens had attached before the FDIC acquired the property. Similarly, because Sections 1825(a) and (b)(1) make property of the FDIC subject to ad valorem taxes "to the same extent * * * as other real property is taxed," nothing in the statute prevents local authorities from pursuing remedies other than foreclosure (and the other remedies barred by the statute) to collect the taxes. See *Matagorda County* v. *Law*, No. 92-7756 (5th Cir. Apr. 21, 1994), slip op. 3687, 3697 ("[Section 1825 does not] prevent the Taxing Units pursuing collection of their personal judgment against the [previous] landowner."). Petitioners' desire to use the particular remedies that Congress has prohibited is not a basis for ignoring the statutory language.

b. Petitioners also challenge (Pet. 14-16) the court of appeals' interpretation of the provision of Section 1825(b)(1) regarding redetermination of ad valorem tax valuations. Petitioners no longer challenge the conclusion of the lower courts that the last clause of that provision permits the FDIC to seek a redetermination of

valuations used to assess taxes against its property; rather, they limit their claim in this Court to the proposition that the FDIC can seek such a redetermination only if the valuation is made while the FDIC owns the property.

The language enacted by Congress rebuts petitioners' argument. The statute provides: "[N]otwithstanding the failure of any person to challenge an assessment under State law of [the] property's value, such value, and the tax thereon, shall be determined as of the period for which such tax is imposed." 12 U.S.C. 1825(b)(1) (Supp. IV 1992). As the court of appeals noted (Pet. App. 7a), nothing in the statute supports a "tempora[l] limi[t]" on the right of the FDIC to challenge valuations. Furthermore, the reference to "any person"—rather than to the "Corporation"—makes clear that the provision governs valuations that are made before the FDIC acquires the property, because the only occasion on which it would be relevant that "any person" other than the FDIC failed to challenge a valuation would be a situation in which the period for challenging the valuation ran before the FDIC acquired the property. Hence, the statute strongly suggests that the FDIC is entitled to challenge valuations made at any time, whether or not the FDIC's challenge is timely as a matter of state law.

Finally, there is no merit in petitioners' suggestion (Pet. 15) that the court of appeals' application of the statute constitutes an impermissibly retroactive interpretation of an ambiguous statute.[2] The provision

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[2] Petitioners do not argue in this Court that the Due Process Clause prohibits application of the statute in accordance with its terms. There is therefore no reason to hold the petition for *Morgan Stanley & Company* v. *Pacific Mutual Life Insurance*

in question does not "attac[h] new legal consequences to events completed before its enactment." Application of it to allow the FDIC to institute challenges after passage of the provision thus does not constitute the type of retrospective application to which the presumption against retroactive interpretations is applicable. *Landgraf* v. *USI Film Products*, No. 92-757 (Apr. 26, 1994), slip op. 25. The challenged provision is a procedural rule of the kind that ordinarily applies to litigation occurring after enactment of the statute. See *id.* at 31 ("Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive."); see also *Matagorda County*, *supra*, slip op. 3696 (Section 1825(b) bars suit to enforce lien that was created before enactment of FIRREA).

Moreover, the explicit temporal limitations in other provisions of the Act through which Congress enacted the provision in question—the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 261-262—support application of the statute in accordance with its terms. FIRREA is replete with provisions that include specific temporal limitations on the various powers it grants. See, *e.g.*, FIRREA § 212, 103 Stat. 224-225 (codified at 12 U.S.C. 1821(c)(6)(B) (Supp. IV 1992)) (powers of Office of Thrift Supervision depend upon when receiver is appointed), 103 Stat. 232 (codified at 12 U.S.C. 1821(d)(13)(A) (Supp. IV 1992)) (FDIC bound by "any final unappealable judgment of any court of competent jurisdiction which was rendered before the appointment

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Company, cert. granted, 114 S. Ct. 680 (1994) (No. 93-609) (argued Apr. 26, 1994).

of the [FDIC] as conservator or receiver"). Congress's attention to such temporal limitations throughout FIRREA counsels strongly in favor of full application of those provisions that do not include such limitations. See *Saudi Arabia* v. *Nelson*, 113 S. Ct. 1471, 1478 (1993) ("Distinctions among descriptions juxtaposed against each other are naturally understood to be significant.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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